Oscar Serrano, a Sole Proprietor d/b/a Serrano Painting *and* International Brotherhood of Painters and Allied Trades, Local No. 86, AFL–CIO. Case 28–CA–15273

July 31, 2000

DECISION AND ORDER REMANDING

BY MEMBERS FOX, LIEBMAN, AND BRAME

On February 16, 2000, Administrative Law Judge William L. Schmidt issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found that the Respondent violated Section 8(a)(3) and (1) by refusing to employ Michael Paz on or about June 23, 1998. In the absence of exceptions, we adopt this finding. We further find that it would effectuate the policies of the Act to sever this uncontested violation from the issues being remanded here and to issue an appropriate remedial order. Because Paz was hired for a specific project, we shall modify the judge's recommended Order to conform with *Dean General Contractors.*[1] Accordingly, we shall give a conditional order of reinstatement, entitling the Respondent to avoid the reinstatement obligation and terminate the backpay obligation at the completion date of the project in question if the Respondent shows in compliance that, under its established policies, an employee hired into a position like the one unlawfully denied Paz would not have been transferred or reassigned to another job after the project at issue ended.[2]

The judge also found that the Respondent did not violate Section 8(a)(3) and (1) by failing to employ or consider Richard Elliott for employment. The Board has considered the decision and the record in light of the exceptions and briefs and finds that substantial and material issues of fact remain unresolved concerning the General Counsel's allegation that antiunion animus contributed to the decision not to employ or to consider Elliott for employment. In finding no evidence of animus as to Elliott, the judge stated:

> The sum of the General Counsel's proof in Elliott's case is that he applied for work with Paz and disclosed (either himself or through Paz) his intention to engage in organizing activities to Respondent's agent Harris. The only added evidence in Elliott's case is that he received an inconclusive response from the receptionist (presumably Harris also) when he later inquired about his application and that he was never hired.

The judge failed to discuss evidence adduced by the General Counsel that Elliott had 15 years' experience as a painter; that the Respondent stated it hired "everybody that [they] could" who had some painting experience; and that in the period after Elliott filed his application, the Respondent hired 16 people, 10 of whom had no painting experience listed in their recent work history.[3] The judge also failed to address conflicting evidence about the Respondent's reason for failing to hire Elliott. Thus, the Respondent's owner, Serrano, stated that when he asked Project Manager Chapman about the hiring decisions on Elliott and Paz, Chapman said that one was sent to a jobsite and never showed up and that there was some confusion over the other one's wages. To the extent that this testimony indicates that Elliott was either instructed to report to a jobsite or that there was confusion over his wages, it conflicts with the testimony of Chapman and Field Superintendent Baker that they had no dealings with Elliott.

Accordingly, we remand this proceeding to the judge to resolve these issues. In remanding, we are seeking to have the judge deal with evidence he previously ignored and make findings thereon, matters uniquely within the province of the judge. Therefore, contrary to our colleague's assertion, we are not seeking to have the judge draw different inferences from the evidence he did consider. In resolving the issues on remand, the judge should fully analyze this case under the Board's recent decision in *FES*,[4] which sets forth the framework for analysis of refusal-to-hire and refusal-to-consider violations.

AMENDED REMEDY

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act, we shall order the Respondent to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent to offer Richard Paz immediate and full employment in the position for which he applied or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. In addition, we shall order the Respondent to make him whole for any loss of earnings and other benefits he may have suffered as a result of the Respondent's discrimination against him, from June 23, 1998, the date of the unlawful refusal to hire him, to the date the Respondent makes him a valid offer of employment. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

This Order is subject to resolution at the compliance stage of the issues outlined in *Dean General Contractors,* supra. Consistent with that decision the Respondent will have the opportunity in compliance to show that,

[1] 285 NLRB 573 (1987).

[2] See *Casey Electric,* 313 NLRB 774, 775–776 (1994).

[3] That the judge mentioned some of this evidence in his findings of fact does not establish that he considered the evidence in making his analysis and conclusion. Indeed, his description of the "sum of the General Counsel's proof" indicates that he did not.

[4] 331 NLRB No. 20 (2000).

under its customary procedures, Paz would not have been transferred to another project after the one for which he was denied employment was completed, and that thus no backpay and employment obligation exists beyond the time when the project as to which discrimination occurred was completed.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Oscar Serrano, a Sole Proprietor d/b/a Serrano Painting, its officers, agents, successors, and assigns, shall take the actions set forth in the order as modified.

Substitute the following for paragraphs 2(a) and (b).

"(a) Within 14 days from the date of this Order, offer Michael Paz full employment in the position for which he applied or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges, in the manner set forth in the amended remedy section of this decision.

"(b) Make Michael Paz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the amended remedy section of this decision."

IT IS FURTHER ORDERED that the portion of Case 28–CA–15273 alleging that the Respondent violated Section 8(a)(3) and (1) by refusing to employ, or consider for employment, Richard Elliott is severed and remanded to Administrative Law Judge William L. Schmidt for the purpose described above.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate, on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER BRAME, dissenting in part.

The majority's remand of the allegation that the Respondent discriminated against applicant Richard Elliott by denying him employment is unwarranted.[1] In agreement with the judge, I would find that the General Counsel failed to establish that the Respondent refused to hire or consider Elliott because of his disclosed union affiliation or his stated intent actively to engage in organizing activities if hired.

It is evident that the judge considered all of the record evidence before concluding that the General Counsel did not sustain his burden of showing that union animus was a motivating factor in the Respondent's failure to hire Elliott. The judge found that the General Counsel established only that Elliott applied for work at the same time as Paz and disclosed to the Respondent's receptionist, Harris, that he intended to engage in union organizing activities if hired, and that he received a noncommittal response from Harris when he called a week later to inquire about his application and was never hired.[2] When viewed in light of uncontradicted evidence that the Respondent hired a number of union members, and denied employment to a number of nonunion applicants, during the same period of time in which Elliott applied, the judge concluded that the evidence presented by the General Counsel was insufficient to meet the General Counsel's burden of showing that the Respondent refused to hire or consider Elliott because of his union activities or support.

Contrary to the majority, the judge fully considered—and rejected—the evidence adduced by the General Counsel in an attempt to establish antiunion animus on the Respondent's part. In so doing, the judge set forth at length in his decision the testimony concerning certain antiunion statements made by Serrano in July 1995 or 1996.[3] The judge described this evidence as "stale" and did not further consider it, either with respect to his assessment of the Respondent's motivation in not hiring Elliott (where he dismissed the allegation), or with respect to his assessment of the Respondent's motivation in not hiring Paz (where the judge found the violation). Thus, the judge carefully and properly distinguished Elliott's case from the evidence presented with respect to

[1] In the absence of exceptions, I join the majority in adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to employ Michael Paz. I also agree with the majority that the judge erred in recommending an unconditional remedy of reinstatement and backpay for this violation. For the reasons set forth in my concurrence in *FES (A Division of Thermo Power),* 331 NLRB No. 20, slip op. at 21–22 (2000), however, I would limit the scope of the reinstatement order and any backpay liability to the project for which Paz was denied employment unless the General Counsel establishes, in compliance, that but for the Respondent's discrimination against him, Paz would have been transferred to subsequent projects.

[2] The judge did not find that the individuals involved in the Respondent's hiring decisions, Estimator/Project Manager Daniel Chapman and field superintendent Morris (Jimmy) Baker, knew of Elliott's union activities or announced intent to organize the Respondent's employees, and there is no record evidence to support such a finding. Chapman and Baker testified that they had no dealings with Elliott. Owner Oscar Serrano testified that he had no involvement in the hiring process for the project for which Elliott applied. In this regard, Serrano testified that, after receiving the unfair labor practice charge in this case, he asked Chapman about the hiring decisions and that Chapman told him that "one of them [alleged discriminatees Elliott and Paz] was sent to a jobsite and he never showed up and the other one that there was some confusion on the wages." Serrano was not asked, and never stated, which was Elliott and which was Paz. In these circumstances, and in light of Serrano's uncontradicted testimony that he had no involvement in the decision not to hire Elliott and did not know why he was not hired, there is no basis for the majority's position that there is "conflicting evidence about the Respondent's reasons for failing to hire Elliott."

[3] Serrano told applicant Chris Lavoie, a union member, that his shop was not union and that if Lavoie talked to any of Serrano's employees about the Union that would be grounds for termination, and ultimately told Lavoie that he would not hire him because of his expressed intention to organize Serrano's employees.

Paz, by finding, with respect to Paz *only*, that the General Counsel had shown that the Respondent presented shifting, inconsistent, and "unconvincing" reasons for its failure to hire him. Accordingly, a remand is unnecessary for further consideration of the record evidence concerning animus.

In addition, the judge set forth, at some length, the record evidence concerning Elliott's experience as a painter, Serrano's testimony that the Respondent was hiring "everybody that [they] could who had some painting experience, and the Respondent's continued hiring after Elliott submitted his application (and was not hired). Thus, the judge did "discuss" this evidence. While the judge did not reiterate all of the evidence favorable to the General Counsel in the analysis section of his decision, the majority has no justification for arguing from the judge's failure to reiterate that the judge therefore ignored the evidence discussed earlier in his opinion in deciding to dismiss the complaint as to Elliott.

The majority's asserted belief that a remand is necessary because of the Board's decision in *FES* is equally without merit. *FES* addresses whether and how the General Counsel must establish the qualifications of the alleged discriminatee for the job for which he or she was not hired, and the existence of openings. Neither of these factors is at issue in this case. To the contrary, it is undisputed that Elliott was qualified for the position for which he applied and that the Respondent had openings for persons with his qualifications. The majority provides no justification for its assertion that there is anything in *FES* which will in any way affect the judge's (or the Board's) consideration of this case.

The majority is not remanding this case for any credibility determinations, or for other findings that are uniquely within the province of the judge. Rather, the majority appears to believe that the judge drew the wrong inferences from the evidence presented by the General Counsel. In these circumstances, the Board is as capable as the judge of determining whether the evidence supports the General Counsel's allegations, and a remand is thus both unwarranted and, in my view, a poor use of the Board's administrative resources.

Richard A. Smith, Atty., for the General Counsel.
Donald Peder Johnsen and *Kevin R. Robling, Attys. (Gallagher & Kennedy, P.A.)*, of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. International Brotherhood of Painters and Allied Trades, Local No. 86, AFL–CIO (Local 86, the Union, or the Charging Party), filed an unfair labor practice charge on June 29, 1998, and later amended the charge on August 3.[1] Based thereon, the General Counsel issued a complaint on September 1 alleging that Oscar Serrano, a Sole Proprietor d/b/a Serrano Painting (Serrano, Company, or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by refusing to employ Michael Paz, a union official and a paid organizer, and Richard Elliott, or to consider them for employment. Respondent's timely answer denied that it engaged in the unfair labor practices alleged.

I heard this matter on March 16, 1999, at Phoenix, Arizona. After carefully considering the entire record, including my observation of the demeanor of the witnesses, and the posthearing briefs filed by the General Counsel and Respondent, I have concluded that Respondent violated the Act as to Paz but not as to Elliott on the basis of the following:[2]

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

A. Relevant Facts

The Company maintains its office in Mesa, Arizona, where it is engaged in business as a commercial painting contractor.[3] At relevant times, its managerial hierarchy consisted of Oscar Serrano, the owner, estimator and Project Manager Dan Chapman, and Field Superintendent Morris (Jimmy) Baker. In addition, the parties stipulated that Michelle Harris, Respondent's receptionist, was an agent of Respondent for the purpose of receiving applications for employment. On larger projects, Respondent's employees are directly supervised by a project foreman who ordinarily report to Baker.

Serrano himself has little to do with employment applications or the hiring of field employees who work on the Company's projects and never saw the applications of the two employees involved in this case until after the unfair labor practice charge was filed. However, Serrano said that the Company, when in need of painters, ordinarily preferred to hire the most experienced painters available.

Baker hired the vast majority of Respondent's field employees. However, during the specific times relevant to this case, Baker's time was divided between projects in the Phoenix area and other projects in Yuma, Arizona, some considerable distance from Phoenix. As a result, Chapman became involved to a degree in reviewing applications and interviewing applicants. According to Chapman, Respondent's support staff prepared an applicant log form containing information taken from the writ-

[1] All relevant events occurred in the 1998 calendar year and, unless shown otherwise, all further date references are to the 1998 calendar year. The original charge alleged only Michael Paz as a discriminatee; the amended charge alleged Paz and Richard Elliott as discriminatees.

[2] The General Counsel's unopposed motion to correct the transcript is granted. Certain credibility resolutions are specifically addressed below. All findings here have been based on a review of the entire record and all exhibits in this proceeding. Witness demeanor and the inherent probability of the testimony have utilized to assess credibility and formulate my findings. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony, or documents, or because it was inherently incredible and unworthy of belief.

[3] The parties stipulated that Respondent annually purchases goods valued at more than a de minimus amount from points directly outside the State of Arizona and that it also purchases goods valued in excess of $50,000 from enterprises directly engaged in commerce. Accordingly, I find Respondent meets the Board's discretionary indirect inflow standard and that it would effectuate the purposes of the Act for the Board to exercise its statutory jurisdiction to resolve this labor dispute. I further find that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

ten applications and, when the need for a new employee arose, he called applicants from that log. A sample of the applicant log reflects a single line application summary containing columns showing the applicant's name and telephone, years of experience, wage information, drivers license and transportation information, and recent employment history.

This case relates to the Local 86's most recent organizing effort by salting Serrano's workforce with union members willing to proselytize workers for that union's cause. In one past effort during July 1995 or 1996, Local 86 organizer Lonny Tender, and three Local 86 members, Chris Lavoie, Doug Robinson, and Julio Garcia, applied for employment with Serrano at the behest of the Local's business agent. At that time, Serrano hired Garcia but withdrew an apparent employment offer to Lavoie after Lavoie and Serrano argued during a job interview over Lavoie's stated intentions about organizing Serrano's employees. Lavoie claims that he told Serrano that he intended to organize Serrano's employees but that he would not do it "on your jobsite or on your time." In response, Serrano told Lavoie repeatedly that his shop was not union and that he did not intend for it to be union. Lavoie claims without contradiction that Serrano stated at one point during their discussion that if Lavoie "talked to any of [Serrano's] guys, that would be grounds for termination." Finally, Serrano told Lavoie that "[t]his conversation is not going anywhere" and that he was not going to hire him "at this time." Lavoie claims, again without contradiction, that he then asked Serrano if he was refusing to hire him "just because I intend to organize your shop" and that Serrano responded: "Yes."[4]

Serrano recalled Lavoie's job interview. However, he claims that the interview terminated after Lavoie became abusive in his insistence about engaging in organizing activities whenever he pleased whether on worktime or not. Although Serrano did not deny the specific statements attributed to him by Lavoie, he asserted that he told Lavoie that he would be free to discuss union matters with the employees on nonworktime.

Paz, a journeyman painter since 1975, has been a member of Local 86 for 23 years. At the time of the hearing, Paz also served as a trustee for Local 86 and for a period from 1996 through most of July 1998, Paz also worked as a paid organizer for Local 86. His organizing duties involved efforts to organize nonunion employers utilizing "top down" (persuading the contractor to sign a union agreement) or "bottom up" (persuading the contractor's employees to select Local 86 as their representative) methods.[5] As in the past, Paz encouraged unemployed Local 86 members to seek work with nonunion contractors in order to promote unionization among targeted employees at the worksite and, from time to time, he sought such employment himself for the same purpose.

Late in the spring of 1998, Respondent was awarded large painting contracts by a Phoenix school district that required a substantial number of painters. Because most of its regular employees (typically from 8 to 15 employees) were assigned to other jobs, the Company set out to quickly hire 50 to 60 employees for these two projects primarily by advertising for painters in the area newspapers. The advertisements produced a number of applicants. According to Serrano, Respondent hired "everybody that [they] could" who had some painting experience and who would work at the hourly rate of $10 to $12 it could afford to pay. By Serrano's estimate the Company had 30 to 50 painters on the two Phoenix school projects at all times in the period from May through August. However, it had to hire considerably more employees to maintain that staffing level due to a significant turnover resulting from the discharge of unqualified or unreliable employees and those who quit due to the summer heat.[6]

Union organizer Paz noticed one of Respondent's early advertisements for painters on May 31 and immediately arranged for two other Local 86 members, Richard Elliott and Armando Garcia, to apply for employment with him. Elliott had more than a decade of work experience as a painter and had been a Local 86 member throughout that time; Garcia's experience is unknown. Paz devised a plan for Elliott and himself to overtly disclose their union affiliation during the application process at Respondent's office by wearing clothing that bore highly visible union insignia on their shirts and caps. Paz arranged for Garcia to apply as a covert salt. To disguise Garcia's alignment with Elliott and himself, Paz dropped Garcia at a nearby retail store while Elliott and Paz proceeded to Respondent's office to complete the applications. When they finished Paz then returned and transported Garcia to Respondent's office to apply. Garcia wore clothing without any union insignia.

At the Company's office, the receptionist, presumably Harris, provided Paz and Elliott with applications that they completed and returned to her. She advised them that someone from the Company would contact them later and, in response to Paz' inquiry, she also told the two men that the Company had "a lot of work" and that they would likely be hired. In addition to their clothing that bore prominent union logos, both men listed union contractors as prior employers on their applications and Paz explicitly told the receptionist that he sought employment with the Company primarily to organize Respondent's employees. On his application, Paz reported that the pay rate on his most recent job had been $12 per hour but did not list his years of experience. Elliott signified that he had earned $12.50 and $13 per hour on his last two jobs. As Garcia did not testify, nothing is known about what occurred during his application process but, concededly, he was never hired.

Slightly more than a week later, around June 9 or 10, Elliott telephoned the Company to follow up on his application for work. At that time he spoke only with an unidentified female secretary. He told the secretary that he had been previously informed that his application would be reviewed and that he would be contacted. The secretary again advised him that "somebody would look over it and get back [to him]." However, Elliott never heard further about his application or work with the Company. Elliott asserted that he would have accepted work with the Company if it had been offered.

Paz did not pursue the status of his application until about the third week of June, around June 22. This followup occurred after Paz observed that the Company continued to advertise for painters and that two other Local 86 members, Covell and Labella, lacked work. The convergence of these two factors ap-

[4] No evidence shows that Tender or Robinson were offered employment at this time. According to Serrano, Garcia never reported for work at his assigned jobsite.

[5] Under Sec. 8(f) of the Act, so-called top down organizing can be lawful as that section permits employers and labor organizations in the building and construction industry to enter into prehire agreements, subject to certain limitations, without regard to a labor organization's majority standing among the employees involved.

[6] GC Exh. 2 reflects that Respondent hired 66 employees in the period from May through August 1998.

parently caused Paz to plan a further salting effort. To this end, Covell and Labella agreed to Paz' suggestion to cooperate by applying for work with the Company as covert salts. On June 22 Paz led both men to the vicinity of the Company's Mesa office and instructed them to wait while he proceeded on to the office alone to inquire about work. At the office, Paz spoke only to the receptionist; he reminded her that he had earlier applied for work and asked when he might be hired. The receptionist told Paz that she did not know but, that she would "get back with the superintendent." She also told Paz that the Company still had a lot of work. Paz then returned to Covell and Labella and instructed them to go apply for work.

Neither Covell nor Labella testified. However, the documentary evidence establishes that the Company hired Covell on June 25 and, shortly thereafter, encountered problems with Covell. Thus; around July 3 Covell went on a "wage strike." By a letter dated July 13, Covell made an unconditional offer to return to work. In a letter dated July 14, the Company offered to reinstate Covell to his job at the "previous terms and wage rate." (See GC Exh. 2, p. 2, and R. Exhs. 1 and 2.) According to Serrano, the Company essentially terminated Covell after he failed to return to work by July 21. There is no indication that the Company ever knew of Labella's allegiance to Local 86 and the record of employees hired through the relevant period of 1998 does not indicate that Labella was ever hired.

Project Manager Chapman claims to have spoken directly with Paz by telephone on either June 22 or 23 to inquire about his experience generally and whether he was a capable spray painter. Chapman recalled that Paz informed him that he was a union organizer and that he intended to attempt to organize Respondent's employees if he came to work. In response, Chapman told Paz: "Well, you know, we're not a union contractor." Chapman also claims that, after Paz assured him that he could spray paint, the two men had an inconclusive exchange about an acceptable rate of pay. In sum, Chapman avoided stating outright what the Company would pay, and Paz would not state what rate he would take. Finally, Chapman told Paz that he would have to speak with Field Superintendent Baker about the matter and the conversation ended. Chapman explained that he avoided telling Paz the rate the Company would be willing to hire him for because Paz "was kind of obnoxious and uncooperative" and because he felt that he should speak with Baker first (the person who normally hired field employees) as he did not want "to step on [Baker's] toes."

According to Paz, sometime during the evening of June 22 Baker left an answering machine message instructing him to report for work the following morning at the Barry Goldwater high school in Phoenix if he "wanted to work."[7] At about 9 a.m. the following morning Paz reported to that jobsite and spoke with Company Foreman Lawrence Williams. Paz told Williams that he had received a telephone call from the Company instructing him to report, and asked if work was available. Williams confirmed that he needed a spray man, work which Paz had considerable experience performing. Paz then told Williams that his "main objective was to organize the shop on my own time after work hours and during lunch time."

Williams claims that he had received no advanced notice from the Company that a new employee would be reporting that morning and that Paz did not appear to have any information about his pay rate. Presumably for these reasons, Williams told Paz that he needed to make a phone call and proceeded to place a call on a "walkie-talkie" device in Paz' presence so that Paz could overhear both ends of the conversation. Williams reached Project Manager Dan Chapman. Paz gave this account of the conversation that followed:

> Mr. Williams said that—he had told him that he had a painter here ready to go to work and that I had put in an application for Serrano and that I was a union painter and ready to go to work. And then Dan, he said, he responded saying, "Well, we're not a union shop." And then he said that he would—and then there was a brief pause there and Mr. Williams—I mean Dan said to Mr. Williams, "Well, I'll get back with you but I'm going to review some of these applications."

After Williams' conversation with Chapman ended, Williams told Paz "you'd better call back the shop" and that he could "start first thing in the morning [because] we did need help out there."

Williams explained that as the job foreman he plays no role in establishing employee pay rates. Instead, that determination, according to Williams, would be made by either Serrano, Chapman, or Field Superintendent Baker. Williams admitted that Paz identified himself as an organizer and that he told Chapman during the call that Paz was a "union member" to help him "recollect who the gentleman was." By Williams' account, Chapman merely responded: "Okay, he's a union man and he still has to contact me at the office to find out exactly what, you know, we decide we're going to pay."

Chapman also recalled the conversation with Williams. By his account, Williams reached him at another jobsite rather than the Company's office and advised him that a man was "out here that says he's a union organizer and he says he's going to organize our crew." Chapman told Williams to tell him "we are not a union shop. We don't have a union contract." At some point during this exchange, Chapman claims that either Williams told him that the person at the jobsite was Paz or he figured it out for himself based on the recent conversation. Regardless, Chapman further claims that during the conversation "it kind of hit me . . . that we ought to hire this guy." Accordingly, Chapman said that he told Williams to have Paz "call the office, we'll figure out where he's going and how much he's making and we'll put him on." Chapman claims that it would be very "unusual" for an employee to be hired and sent to a jobsite without a prior arrangement concerning a wage rate or without notifying the foreman in advance that a new employee had been hired.

After the call with Williams ended, Chapman claims that he "immediately" called Harris at the office and gave this instruction: "When this guy [Paz] calls in, tell him to get ahold of me or Jimmy. We need to find out how much he wants. We need to figure out where we're going to put him when we put him to work. We have to hire this guy." Chapman explained the "he

[7] This finding is based on Paz' testimony. I do not credit Baker's hedging, inconsistent testimony to the contrary. Thus, during his direct examination, Baker flatly denied that he would have left a message on an applicant's answering machine to report to work at a jobsite. On cross-examination, Baker conceded that he may have left a message on Paz' answering machine as Paz claims but asserted that such a message would have been limited to an instruction to call the office in order to arrive at an agreement about an acceptable pay rate. Paz' account is consistent with his actions the following day which is generally corroborated by the testimony of Job Foreman Williams.

kind of figured that we were going to have problems if we didn't hire him."

For his part, Paz claims that later that day, around 2 p.m., he telephoned the Company's office and spoke only with the receptionist. He explained that he had been told to call about work.[8] She responded only that Chapman reviewed applications but she never connected Paz with Chapman or Baker as purportedly instructed. Paz made no further calls to the Company and received no further calls from the Company. All told, Respondent hired five employees between June 24 and 29 when Paz filed the unfair labor practice charge including, as discussed above, Covell, one of the Union's covert salts who applied for work on June 22.

B. Further Findings and Conclusions

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." Applicants for employment, including applicants who are also paid union organizers, are employees within the meaning of Section 2(3) of the Act and an employer violates Section 8(a)(3) by failing or refusing to hire an applicant for employment because of their union membership or activities. *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995); and *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

Under the causation test established in *Wright Line*, 251 NLRB 1083 (1980), and approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), as modified in *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994), the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct, here seeking employment in order to engage in union organizing, motivated the employer's adverse action. In discriminatory refusal to hire cases, the General Counsel must establish that: (1) the alleged discriminatee applied for employment; (2) the employer knew or suspected the applicant was a union sympathizer; (3) the employer harbored an animus toward union sympathizers; (4) the employer failed or refused to hire the applicant; and (5) the employer refused to hire the applicant because of its animus toward union sympathizers. *M. J. Mechanical Services*, 324 NLRB 812, 816 (1997).

If the General Counsel establishes a prima facie case, the employer then has the burden of persuading the trier of fact that the same adverse action would have been taken even in the absence of the employee's protected activity. *Best Plumbing Supply,* 310 NLRB 143 (1993). To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

Respondent does not quibble with the evidence showing conclusively that Elliott and Paz applied for employment or the evidence showing that both men disclosed their affiliation with the Union. However, Respondent contends that the General Counsel failed to meet his *Wright Line* burden because there is no evidence that the Company's failed or refused to hire Elliott and Paz due to union animus. Respondent asserts that the Lavoie incident, 2 or 3 years earlier, is insufficient to support a conclusion that its failure to hire Elliott and Paz was unlawfully motivated particularly where, as here, Serrano offered employment to at least one other union salt, Julio Garcia, who accompanied Lavoie that day. In addition, Respondent argues that the General Counsel's claim of an unlawful motivation is severely undercut by its evidence showing that the Company hired a number of union members during this period and by further evidence showing that other applicants, including some with a history of union membership and some without, were not hired. Respondent further argues that Chapman's statements to Paz that the Company was nonunion do not indicate union animus. Instead, such statements, Respondent asserts, are merely assertions of fact. In sum, Respondent argues that the record in its entirety is consistent with Serrano's assertion that an applicant's union affiliation has no bearing on the Company's hiring decisions.

To the extent that Respondent argues that the General Counsel must supply some direct evidence of union animus and has failed to do so other than the stale evidence related to Lavoie, I cannot agree. In describing the *Wright Line* burdens the Board stated in *Naomi Knitting Mills*, 328 NLRB 1279, 1281 (1999):

> [T]he General Counsel is required to show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer's conduct. Once this showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. To sustain his initial burden the General Counsel must show
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> > (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine.
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> *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enforcing 314 NLRB 1169 (1994) (citations omitted).

As the Board explained In *Fluor Daniel*, 311 NLRB 498 (1993), an unlawful motive may be inferred from the totality of the circumstances even in the absence of direct evidence of animus. Specifically, in the *Fluor Daniel* case the Board observed:

> It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be based on the Board's review of the record as a whole. [Citations omitted.]

Applying the foregoing principles to the facts of this case, I concur with Respondent's contention that the General Counsel failed in his burden of persuasion as to Elliott but, I do not concur with Respondent's contention as to Paz. The sum of the General Counsel's proof in Elliott's case is that he applied for work with Paz and disclosed (either himself or through Paz) his intention to engage in organizing activities to Respondent's agent Harris. The only added evidence in Elliott's case is that

[8] Paz gave no indication that he knew the identity of the receptionist from whom he had originally received an application or the identity of the person to whom he spoke on June 23.

he received an inconclusive response from the receptionist (presumably Harris also) when he later inquired about his application and that he was never hired. However, the showing that a mix of union and nonunion applicants were not hired compels me to conclude that the evidence, viewed in its entirety, is insufficient to support a finding that Respondent refused to consider or hire Elliott because of his disclosed union affiliation or his stated intent to actively engage in organizing activities if hired. This conclusion is further buttressed by the evidence discussed below showing that the Company called Paz, the more militant of the two, to report for work. Accordingly, I recommend that the complaint be dismissed as to Elliott.

The flawed and incomplete recollection of Respondent's witnesses in particular, and Paz to a lesser degree, complicate the circumstances surrounding Paz' case. Ultimately, however, I have concluded that the witnesses painted enough of a picture to warrant the conclusion that the postapplication events in Paz' case more likely than not occurred as follows. First, the testimony of both Chapman and Williams converge sufficiently to support the conclusion that by June 22 the Company was in need of a qualified sprayer on the Barry Goldwater project. This need I find resulted in Chapman's call to Paz on June 22 during which Chapman learned that Paz was an experienced painter who asserted that he was qualified to spray.[9] In addition, Chapman admitted that Paz disclosed in this conversation that he was a union organizer and that he intended to actively engage in organizing if hired. However, Chapman further acknowledged that he and Paz engaged in an inconclusive banter about pay during which Chapman never stated what the Company was willing to pay and Paz never stated what he would be willing to accept. By his own admission Chapman decided to refer Paz' employment to Baker because hiring employees was normally his job and he did not want to "step on his toes."

I credit Paz' claim that Baker left a message on June 22 for him to report to the Barry Goldwater project the following morning if he wanted to work. Baker's initial assertion that he would never leave such a message on an applicant's answering machine when coupled with his subsequent admission that he might have left a message for Paz to call the Company's office demonstrates at the very least Baker's lack of recollection concerning any call to Paz or the circumstances leading to it. In addition, the likelihood that Chapman spoke to Baker as he planned to do concerning Paz' employment to fill the needed sprayer's position at the Goldwater school project is highly likely in view of Paz' credible claim that he was instructed to report to that specific project and that he did so the following morning.

I find Paz' account of the "walkie–talkie" conversation between Chapman and Williams equally credible. Based on his account, I conclude that Chapman again stubbornly avoided specifying a pay rate for Paz, purportedly the sole impediment to Paz beginning work then and there. Chapman's added comment to Williams that he intended "to review some of these applications" is fundamentally at odds with the assertion in his testimony that he had decided to hire Paz in order to avoid trouble. As this remark followed soon after Chapman's "we're not a union shop" assertion and both occurred in the context of Chapman's continued refusal to simply end the pay rate problem despite the immediate need for a sprayer on the Goldwater job, I am completely satisfied that Respondent harbored another, undisclosed motive for bypassing Paz in favor of several other applicants over the next few days. This conclusion is further supported by the showing that Paz was again stonewalled when he called the Company office later that day despite Chapman's purported "immediate" instruction otherwise to the office staff. Finally, the failure of any Company official to again contact Paz (as Chapman and Baker did the day before) to fill the existing sprayer's job at the Goldwater school project is also at odds with Chapman's purported determination to hire Paz out of fear that there would be trouble otherwise. Accordingly, I find Respondent's asserted defense, i.e., that its failure to hire Paz was grounded on an incomplete application and interview process free of any union considerations, unconvincing.

On the basis of the entire record here, and in particular the events of June 23, I conclude that Respondent's true motive for refusing to employ Paz lies in his repeated assertions that, if hired, he intended to aggressively pursue organizing activities on behalf of Local 86. This inference is not at all inconsistent with the evidence showing that Respondent hired a few other union employees. In virtually every case the Respondent did not learn of their past or present union affiliation until after they were employed, all appear to have belonged to local unions located far from the Phoenix area, and, unlike Paz, none were shown to have participated actively in Local 86's organizing project apart from the covert salts whose intentions were never disclosed to Respondent before they were hired. For the foregoing reasons, I further conclude on the record as a whole that the General Counsel has established by a preponderance of the evidence that Respondent violated Section 8(a)(1) and (3) by refusing to employ Paz because of his stated intent to actively organize on Local 86's behalf if hired.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to employ Michael Paz on or about June 23, 1998, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.
4. The unfair labor practice of Respondent affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act, my recommended Order will require it to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to hire Michael Paz because of his stated intention to actively engage in organizing Respondent's employees, my recommended Order requires that the Respondent offer Paz immediate and full employment in the position for which he applied or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. My recommended Order further requires the Respondent to

[9] Paz, who testified before Chapman, asserted generally that he received no calls from any Company official until Baker left a message on his answering machine. The General Counsel called Paz as a rebuttal witness after Chapman had testified but made no inquiry of Paz concerning Chapman's claim that he talked to Paz about his qualification as a sprayer. For this reason, I find that Chapman's account of his conversation with Paz is uncontradicted.

make Paz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with backpay extending from June 23, 1998, the date of the unlawful refusal to hire him, until the Respondent offers him employment. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Oscar Serrano, a Sole Proprietor d/b/a Serrano Painting, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire applicants for employment because of their activities on behalf of Local No. 86, International Brotherhood of Painters and Allied Trades, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Michael Paz full employment in the position for which he applied or, if such a position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges.

(b) Make Michael Paz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner described in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Mesa, Arizona, place of business, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted and in locations where they may be observed by applicants for employment. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 29, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to hire applicants for employment because of their activities on behalf of Local No. 86, International Brotherhood of Painters and Allied Trades, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Michael Paz full employment in the position for which he applied or, if such a position no longer exists, to substantially equivalent position, without prejudice to his seniority or any other rights and privileges.

WE WILL make Michael Paz whole for any loss of earnings and other benefits suffered as a result of our unlawful refusal to employ him together with interest required by law.

OSCAR SERRANO, a SOLE PROPRIETOR D/B/A SERRANO PAINTING

[10] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."